

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF TOMPKINS

ANSCHUTZ EXPLORATION CORPORATION,

Petitioner-Plaintiff,

-against-

For a Judgment Pursuant to Articles 78 and 3001
of the Civil Practice Law and Rules,

TOWN OF DRYDEN and TOWN OF DRYDEN
TOWN BOARD,

Respondents-Defendants.

Index No.: 2011-0902

MEMORANDUM OF LAW OF PROPOSED
AMICUS CURIAE TOWN OF ULYSSES

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PRELIMINARY STATEMENT

The Town of Ulysses (“Ulysses”) respectfully submits this memorandum of law in support of its motion, by order to show cause, for leave to appear as amicus curiae in the above-referenced proceeding.

This hybrid Article 78 proceeding and declaratory judgment action filed by Petitioner-Plaintiff Anschutz Exploration Corporation (“Petitioner” or “Anschutz”) seeks to void a resolution of Respondent-Defendant Town Board of the Town of Dryden (“Dryden”), adopted pursuant to its constitutionally-guaranteed and legislatively-delegated zoning powers, determining that the exploration for, extraction, storage, treatment, and disposal of natural gas and/or petroleum is not a permitted use of land in Dryden. Anschutz claims that all of Dryden’s land use powers are superseded by Environmental Conservation Law (“ECL”) § 23-0303(2), which preempts a municipality’s attempt to regulate the operations of oil and gas extraction. Threatening to undermine the longstanding power of a municipality, pursuant to its home rule authority, to enact generally applicable zoning regulations determining permitted and prohibited land uses within its borders, this matter is undoubtedly of great statewide importance.

Ulysses respectfully requests this Court’s permission to appear as amicus curiae in this proceeding upon the grounds that (1) Ulysses brings to the attention of this Court substantial persuasive authority concerning the issues of state preemption and a municipality’s zoning authority with respect to the oil and gas industry, which may otherwise escape this Court’s consideration; (2) this matter, involving the interplay between the municipal authority to regulate land use through the use of generally applicable zoning ordinances and the ability of the oil and gas industry to conduct hydraulic fracturing operations in New York, is of significant statewide

interest; and (3) Ulysses's amicus curiae application will not prejudice the rights of the parties to this proceeding, nor will it delay the full submission of this proceeding in any way. As such, this Court should grant Ulysses's motion for permission to appear as amicus curiae in this proceeding.

With respect to the substance of Anschutz's claims, Ulysses respectfully submits that there is no basis to find preemption of a municipality's land use powers. Under Anschutz's view, the oil and gas industry can dictate the location of any drilling and other related heavy industrial uses within a municipality without regard to local zoning laws or ordinances. An oil and gas concern could, for example, locate a drilling operation next to a school or church, or in a residential district, so long as the State has given approval to do so, regardless of the terms of the municipality's zoning ordinance. Such a result disregards the State's longstanding municipal land use home rule principles and is unsupported by ECL 23-0303(2), which preempts only local regulation of the oil and gas industry, not local land use laws that govern whether and where such operations may take place within a municipality's borders. As demonstrated fully below, Anschutz's claims should be rejected.

ARGUMENT

POINT I

THIS COURT SHOULD GRANT ULYSSES'S MOTION TO APPEAR AS AMICUS CURIAE IN THIS PROCEEDING

As New York courts have repeatedly recognized, an amicus curiae is one who, while acting as a friend of the court, "call[s] the court's attention to law or facts or circumstances in a matter then before it that may otherwise escape its consideration." Kemp v Rubin, 187 Misc 707, 709 (Sup Ct, Queens County 1946); see also Matter of Empire State Assn. of Assisted Living, Inc. v Daines, 26 Misc 3d 340, 342 (Sup Ct, Albany County 2009) ("[a]n amicus curiae

— friend of the court — is a person appearing in a judicial proceeding to assist the court by giving information or otherwise” [internal quotation marks omitted]); Matter of Colmes v Fisher, 151 Misc 222, 224 (Sup Ct, Erie County 1934) (“an *amicus curiae* is one who, as a stander by, when a judge is in doubt or mistaken in a matter of law, may inform the court” [internal quotation marks omitted]). An *amicus curiae* occupies a unique position in the courtroom. The *amicus curiae* is not a party to the proceeding and, thus, may not control the direction of the litigation. See Kruger v Bloomberg, 1 Misc 3d 192, 196 (Sup Ct, NY County 2003). However, the Court may permit an *amicus curiae* to “introduce argument, authority or evidence” (Ladue v Goodhead, 181 Misc 807, 811 [Sup Ct, Erie County 1943]) or even to participate in a hearing or trial by questioning a witness. See e.g. Dawe v Silberman, 185 Misc 335, 336-337 (Mun Ct, Queens County 1944), affd 185 Misc 338 (App Term, 2d Dept 1944).

In considering a motion for leave to appear as *amicus curiae*, the courts generally consider the following criteria:

- (1) whether the movant seeking *amicus curiae* status moves by order to show cause; a motion by order to show cause seeking *amicus* is the preferable procedure as the trial court can then set an expeditious return date and procedure for providing notice by specifying how the parties are to be served, so as not to interfere with the main action;
- (2) whether the affidavit/affirmation in support indicates the movant’s interest in the issues to be briefed and sets forth the issues, with a proposed brief attached;
- (3) whether the affidavit/affirmation in support indicates:
 - (a) a showing that the parties are not capable of a full and adequate presentation and that movant could remedy this deficiency; or
 - (b) that movant would invite the court’s attention to the law or arguments which might otherwise escape its consideration; or
 - (c) that its *amicus curiae* brief would otherwise be of special assistance to the court; and

(4) whether the amicus curiae application or status would substantially prejudice the rights of the parties, including delaying the original action/proceeding; and

(5) whether the case concerns questions of important public interest.

Kruger, 1 Misc 3d at 198; see generally Rules of Ct of Appeals (22 NYCRR) § 500.23(a)(4) (“A motion for amicus curiae relief shall demonstrate that: [i] the parties are not capable of a full and adequate presentation and that movants could remedy this deficiency; [ii] the amicus could identify law or arguments that might otherwise escape the Court’s consideration; or [iii] the proposed amicus curiae brief otherwise would be of assistance to the Court.”). Generally, leave to appear as amicus curiae is liberally granted, especially “[i]n cases involving questions of important public interest,” though the ultimate determination is left in the sound discretion of the court. Colmes, 151 Misc at 225 (internal quotation marks omitted); see also Empire State Assn. of Assisted Living, Inc., 26 Misc 3d at 343.

Here, Ulysses is moving, by order to show cause, for permission of this Court to appear as amicus curiae in this proceeding. As the affidavit of Roxanne Marino, the Supervisor of the Town of Ulysses, notes, Ulysses is particularly interested in this proceeding because Petitioner’s position could significantly undermine the power of the municipalities of this State, including Ulysses, to use their legislatively-delegated zoning powers to determine the types and kinds of land uses that shall be permissible within their borders. Municipalities spend significant amounts of time, effort, and resources on developing a comprehensive plan, pursuant to the City, Town, or Village Law, outlining the zoning and planning goals for the future of their communities. As New York courts have repeatedly recognized, the use of these powers are paramount to promoting principles of smart growth and sustainable communities and local municipalities are in the best position to determine what land uses should be permissible or prohibited. If this Court were to accept Petitioner’s contention in this proceeding — that generally applicable

municipal zoning ordinances are superseded by the ECL solely for property within the municipality owned or leased by a corporation in the oil and gas industry, such as Petitioner — municipalities throughout the State would be deprived of the express authority that was delegated to them by the Legislature and derived from the New York State Constitution to determine what types of land uses best serve the needs and interests of their residents. In light of these policy considerations, such a construction of ECL 23-0303(2) is plainly inappropriate.

Furthermore, as set forth more fully below, Ulysses invites this Court's attention to section 602 of the Pennsylvania Oil and Gas Act (PA Stat Ann, tit 58, § 601.602), which contains a very similar supersession clause as exists in ECL 23-0303(2) and may otherwise escape this Court's consideration. As in ECL 23-0303(2), section 602 expressly supersedes "all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act," with the exception of ordinances adopted pursuant to two Pennsylvania state statutes, neither of which concerns a local municipality's zoning authority. PA Stat Ann, tit 58, § 601.602. Notably, the Supreme Court of Pennsylvania interpreted section 602 as preempting regulation of the technical aspects of oil and gas operations, but did not preclude local municipalities from regulating land uses within their borders generally and prohibiting oil and gas wells from being located therein. See Huntley & Huntley, Inc. v Borough Council of Borough of Oakmont, 600 Pa 207, 964 A2d 855 (2009). Given the nearly identical language in the two statutes, a similar interpretation of ECL 23-0303(2) is warranted here.

The questions presented in this proceeding concerning the interplay between a municipality's legislatively-delegated zoning authority and Petitioner's reliance on state supersession to avoid compliance with a generally applicable zoning ordinance are undoubtedly of great import to all municipalities in this State, especially those located in the vicinity of the

Marcellus and Utica Shales. Given the relatively new emergence of hydraulic fracturing in New York, and the Department of Environmental Conservation's recent prohibition of such operations on state-owned lands, these issues are plainly of statewide importance. Finally, Ulysses's participation in these proceedings will not prejudice the rights of either party in any way, as Ulysses has sought this relief prior to the full submission of the matter on the return date.

Accordingly, Ulysses respectfully requests that this Court grant its motion for leave to appear as amicus curiae in this proceeding, and consider this memorandum of law in its deliberations.

POINT II

GENERALLY APPLICABLE MUNICIPAL ZONING ORDINANCES ARE NOT PREEMPTED UNDER ECL 23-0303(2)

In this proceeding, Petitioner seeks to upset the longstanding constitutional and statutory authority of municipalities to determine which types of land uses shall be permissible within their borders. Simply put, by arguing that a municipality's local zoning authority is preempted by section 23-0303(2) of the Environmental Conservation Law, Petitioner essentially seeks a total and unique exemption from Dryden's generally applicable zoning ordinance based solely on its status as a corporation in the oil, gas, and solution mining industry. Plainly, such an exemption is not permissible under New York law. See Matter of St. Onge v Donovan, 71 NY2d 507, 515 (1988) (noting "the fundamental rule that zoning deals basically with land use and not with the person who owns or occupies [the property]"); Dexter v Town Bd. of Town of Gates, 36 NY2d 102, 105 (1975) ("it is a fundamental principle of zoning that a zoning board is charged with the regulation of land use and not with the person who owns or occupies it"); Vil. of Valatie v Smith, 190 AD2d 17, 19 (3d Dept 1993), aff'd 83 NY2d 396 (1994). Indeed, the Legislature has set forth a comprehensive statutory scheme under which local governments are vested with

the authority to regulate land use matters, which cannot be preempted absent a clear expression of an intention to do so. See e.g. Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 682 (1996) (emphasizing that “in the absence of a *clear expression* of legislative intent to preempt local control over land use, [ECL 23-2703(2)] could not be read as preempting local zoning authority” [emphasis added]).

A. Constitutional and Statutory Authority of Municipalities to Enact Zoning Laws

The New York State Constitution provides that “every local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law . . . except to the extent that the legislature shall restrict the adoption of such a local law.” NY Const, Art IX, § 2(c)(ii). Implementing this express grant of authority to local governments, the Legislature enacted the Municipal Home Rule Law, which provides that a municipality may enact local laws for the “protection and enhancement of its physical and visual environment” and for the “government, protection, order, conduct, safety, health and well-being of persons or property therein.” Municipal Home Rule Law § 10(1)(ii)(a)(11), (12).

Most importantly, the Legislature delegated to every local government the authority to adopt, amend, and repeal generally applicable zoning ordinances and to “perform comprehensive or other planning work relating to its jurisdiction.” See Statute of Local Governments § 10(6), (7).¹ Moreover, the General City, Town, and Village Law grant municipalities the express authority to regulate land use within their jurisdiction by defining zoning districts and

¹ As explained in the proposed amicus curiae submission of Assemblywoman Barbara Lifton, because the authority to enact zoning regulations was expressly delegated to local governments under the Constitution, any law that would impair that authority, including ECL 23-0303(2), may be subject to the re-enactment requirement of Article IX, § 2(b)(1) of the Constitution. Cf. Wambat Realty Corp. v State of New York, 41 NY2d 490, 496-498 (1977) (holding that the power of the Legislature to act in its usual manner with respect to matters of State concern — i.e., matters other than the property, affairs, or government of a local government — is not impaired by the re-enactment language of Article IX, § 2[b][1]). Notably, although ECL 23-0303(2) was enacted in 1972 and amended in 1981, it was not subsequently re-enacted and, thus, cannot have been intended to supersede a local government’s authority to enact generally applicable zoning regulations.

determining what uses will be permitted therein. See e.g. Town Law § 261 (“*For the purpose of promoting the health, safety, morals, or the general welfare of the community*, the town board is hereby empowered by local law or ordinance to regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land for trade, industry, residence or other purposes.” [emphasis added]); see also General City Law § 20(24), (25); Village Law § 7-700.

As the Court of Appeals has repeatedly emphasized, “[o]ne of the most significant functions of a local government is to foster productive land use within its borders by enacting zoning ordinances.” DJL Rest. Corp. v City of New York, 96 NY2d 91, 96 (2001); see also Udell v Haas, 21 NY2d 463, 469 (1968) (“Underlying the entire concept of zoning is the assumption that zoning can be a vital tool for maintaining a civilized form of existence only if we employ the insights and the learning of the philosopher, the city planner, the economist, the sociologist, the public health expert and all the other professions concerned with urban problems.”). In that same vein, local governments spend significant amounts of time, effort, and resources on developing comprehensive plans, outlining the zoning and planning goals for the future of their communities according to the identifiable features of the lands and natural resources specific thereto. See e.g. Town Law § 272-a(1)(b) (“Among the most important powers and duties granted by the legislature to a town government is the authority and responsibility to undertake town comprehensive planning and to regulate land use for the purpose of protecting the public health, safety and general welfare of its citizens.”); Village Law § 7-722(1)(b); Udell, 21 NY2d at 469 (“[T]he comprehensive plan is the essence of zoning. Without it, there can be no rational allocation of land use. It is the insurance that the public

welfare is being served and that zoning does not become nothing more than just a Gallup poll.”). Indeed, taken together, these powers rightfully leave local land use matters in the hands of local governments — those individuals who know their communities best and can best determine what uses will serve the public health, safety, and general welfare of their citizens. See Kamhi v Town of Yorktown, 74 NY2d 423, 431 (1989) (“a town’s planning needs with respect to its neighborhood parks and playgrounds are ‘distinctively’ matters of local concern”); Adler v Deegan, 251 NY 467, 485 (1929) (Cardozo, J., concurring) (“A zoning resolution in many of its features is distinctively a city affair, a concern of the locality, affecting, as it does, the density of population, the growth of city life, and the course of city values.”); see also Zahara v Town of Southold, 48 F3d 674, 680 (2d Cir 1995) (“decisions on matters of local concern should ordinarily be made by those whom local residents select to represent them in municipal government”).

Because the “inclusion of [a] permitted use in [a zoning] ordinance is tantamount to a legislative finding that the permitted use is in harmony with the general zoning plan and will not adversely affect the neighborhood” (Matter of North Shore Steak House v Board of Appeals of Inc. Vil. of Thomaston, 30 NY2d 238, 243 [1972]), New York courts have consistently held that a municipality’s home rule authority includes the power to zone out certain uses of land in order to serve the public health, safety, or general welfare of the community. See e.g. Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d at 683-684 (upholding the Town’s determination that mining was not a permitted use of land within its borders); Matter of Iza Land Mgt. v Town of Clifton Park Zoning Bd. of Appeals, 262 AD2d 760, 761-762 (3d Dept 1999) (upholding the exclusion of heavy industrial uses from the Town because of “the potential adverse and/or harmful impact” of such uses to the Town’s residents); Thomson Indus. v Incorporated Vil. of

Port Wash. N., 55 Misc 2d 625, 632 (Sup Ct, Nassau County 1967) (“The defendant village may certainly exclude from its industrial district any uses which constitute a danger or nuisance to other properties within the district or within the village.”), mod on other grounds 32 AD2d 1072 (2d Dept 1969), affd 27 NY2d 537 (1970); see also e.g. Village of Euclid v Ambler Realty Co., 272 US 365, 388-389 (1926) (upholding an exercise of local zoning authority to preclude all industrial uses).

Here, Dryden determined that the exploration for and extraction of natural gas, as proposed by Petitioner, “poses a significant threat to its residents’ health, safety, and welfare” and, thus, should not be a permitted use within the Town. Rec on Review, Vol I, at 10 (Town Bd. Meeting Minutes [8-2-11]). This conclusion is amply supported by scientific studies and data and, as established, is well within Dryden’s municipal home rule authority. See id., Appdx I; see generally New York State Department of Environmental Conservation, Revised Draft Supplemental Generic Environmental Impact Statement on the Oil, Gas and Solution Mining Regulatory Program (2011) (hereinafter, “DEC Revised SGEIS”), *available at* <http://www.dec.ny.gov/data/dmn/rdsgeisfull0911.pdf>; Michelle L. Kennedy, *The Exercise of Local Control Over Gas Extraction*, 22 Fordham Env’tl L Rev 375 (2011). Most importantly, Petitioner has absolutely no authority to control local land use decisions that are based on the exercise of municipal police powers and serve the best interests of the community.

Given this well-established and longstanding policy in favor of municipal home rule over land use decisions, any legislative attempt at preemption must explicitly usurp local land use powers since the Legislature is presumed to know the status of New York law. See e.g. Easley v New York State Thruway Auth., 1 NY2d 374, 379 (1956) (“Legislatures are presumed to know what statutes are on the books and what is intended by constitutional amendments approved by

the Legislature itself.”); Rhodes v Herz, 84 AD3d 1, 14 (1st Dept 2011) (holding that, insofar as the Legislature is presumed to know the status of the law at the time it acts, its failure to include a private right of action in an amendment to article 11 of the General Business Law was purposeful); Matter of Estate of Terjesen v Kiewit & Sons Co., 197 AD2d 163, 165 (3d Dept 1994) (“It has long been held that the Legislature is presumed to know what statutes are in effect when it enacts new laws. Had the Legislature intended to add conservators to Workers’ Compensation Law § 115 at the time it enacted Mental Hygiene Law article 77, it could have done so.”). ECL 23-0303(2) contains no explicit preemption of local land use authority. As such, this Court should reject Petitioner’s attempt to upset the longstanding constitutional and statutory authority of municipalities to determine which types of land uses shall be permissible within their borders.

B. ECL 23-0303(2) Does Not Expressly Preempt Generally Applicable Zoning Ordinances.

Although a local government’s municipal home rule powers are construed very broadly, any local law adopted pursuant thereto must be consistent with the Constitution and the general laws of this State. See NY Const, art IX, § 2(c); see also Jancyn Mfg. Corp. v County of Suffolk, 71 NY2d 91, 96 (1987) (“although the constitutional home rule provision confers broad police powers upon local governments relating to the welfare of its citizens, local governments may not exercise their police power by adopting a law inconsistent with the Constitution or any general law of the State”); New York State Club Assn. v City of New York, 69 NY2d 211, 217 (1987), affd 487 US 1 (1988). Where the Legislature has expressly preempted an area of regulation, a local law governing the same subject matter must yield because “because it either (1) prohibits conduct which the State law, although perhaps not expressly speaking to, considers acceptable or at least does not proscribe or (2) imposes additional restrictions on rights granted by State law.”

Jancyn Mfg. Corp., 71 NY2d at 97 (citations omitted); see also Incorporated Vil. of Nyack v Daytop Vil., 78 NY2d 500, 505 (1991). Indeed, as the Court of Appeals has held,

The preemption doctrine represents a fundamental limitation on home rule powers. While localities have been invested with substantial powers both by affirmative grant and by restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies the untrammelled primacy of the Legislature to act . . . with respect to matters of State concern. Preemption applies both in cases of express conflict between local and State law and in cases where the State has evidenced its intent to occupy the field.

Albany Area Bldrs. Assn. v Town of Guilderland, 74 NY2d 372, 377 (1989) (internal quotation marks and citations omitted). Notably, however, the fact that State and local laws touch on the same subject matter does not automatically lead to the conclusion that that the State intended to preempt the entire field of regulation. See Jancyn Mfg. Corp., 71 NY2d at 99 (“that the State and local laws touch upon the same area is insufficient to support a determination that the State has preempted the entire field of regulation in a given area”).

Petitioner asserts that the Legislature has expressly stated its intent to preempt local governments’ zoning authority with respect to property owned or leased by oil, gas, and solution mining entities, such as Petitioner, in ECL 23-0303(2). Specifically, section 23-0303(2) provides that “[t]he provisions of this article shall supersede all local laws or ordinances *relating to the regulation of the oil, gas and solution mining industries*; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law.” ECL 23-0303(2) (emphasis added). Indisputably, this provision clearly evidences the Legislature’s intent to preempt all municipal “regulation of the oil, gas and solution mining industries.” Id. Contrary to Petitioner’s construction, however, the enactment of a generally applicable zoning ordinance, pursuant to a municipality’s home rule authority, does

not constitute “regulation” of the oil, gas, and solution mining industries and, thus, is not preempted under ECL 23-0303(2).

1. The Plain Language of ECL 23-0303(2) Establishes that the Legislature Did Not Intend to Preempt Generally Applicable Zoning Ordinances.

When determining the scope of preemption intended under ECL 23-0303(2), the court must first start with the plain language employed by the Legislature. See Balbuena v IDR Realty LLC, 6 NY3d 338, 356 (2006); Matter of Theroux v Reilly, 1 NY3d 232, 239 (2003) (“When interpreting a statute, we turn first to the text as the best evidence of the Legislature’s intent.”); Riley v County of Broome, 95 NY2d 455, 463 (2000) (“Of course, the words of the statute are the best evidence of the Legislature’s intent.”); see also e.g. Matter of Frew Run Gravel Prods. v Town of Carroll, 71 NY2d 126, 131 (1987) (noting that where the court faced an express supersession clause, the matter turned on the proper statutory construction of the provision). Where, as here, the language chosen is unambiguous, the plain meaning of the words used must control. See Jones v Bill, 10 NY3d 550, 554 (2008) (“As a general proposition, we need not look further than the unambiguous language of the statute to discern its meaning.”); Riley, 95 NY2d at 463 (“As a general rule, unambiguous language of a statute is alone determinative.”); Majewski v Broadalbin-Perth Cent. School Dist., 91 NY2d 577, 583 (1998) (“As the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof.”). Thus, the determination of this matter will turn on this Court’s interpretation of the phrase “relating to the regulation of the oil, gas and solution mining industries.” ECL 23-0303(2).

Notably, the term “regulation” is defined as “an authoritative rule dealing with details or procedure.” Merriam-Webster’s Collegiate Dictionary, at 1049 (11th ed 2004); see also id. (defining “regulate” as “to govern or direct according to rule”). Thus, under the plain language

of section 23-0303(2), a local law is not expressly preempted unless it relates to the details or procedure of the oil, gas and solution mining industries. This is consistent with New York law generally, which draws a distinction between local laws that regulate the operation of a business or enterprise and those that govern land use. See Matter of St. Onge v Donovan, 71 NY2d 507, 516 (1988) (“Nor may a zoning board impose a condition that seeks to regulate the details of the operation of an enterprise, rather than the use of the land on which the enterprise is located.”); Louhal Props. v Strada, 191 Misc 2d 746, 751 (Sup Ct, Nassau County 2002) (“Applicable case law draws a dichotomy between those regulations that directly relate to the physical use of land and those that regulate the manner of operation of a business or other enterprise.”), affd 307 AD2d 1029 (2d Dept 2003). A generally applicable local zoning ordinance, such as that challenged in this proceeding, does not relate to the details or procedure of the oil, gas and solution mining industries in any way. Instead, such an ordinance solely defines and governs the land uses that are permissible within the municipality. Accordingly, given the plain meaning of the words chosen by the Legislature, this Court should conclude that generally applicable zoning ordinances are not preempted by ECL 23-0303(2).

Only one court throughout the State has interpreted the supersession clause contained in ECL 23-0303(2). In Matter of Envirogas, Inc. v Town of Kiantone (112 Misc 2d 432 [Sup Ct, Erie County 1982], affd 89 AD2d 1056 [4th Dept 1982], lv denied 58 NY2d 602 [1982]), the petitioner, a corporation in the oil and gas industry, challenged a zoning ordinance of the Town of Kiantone, which imposed a \$25 permit fee and a requirement to post a \$2,500 compliance bond prior to construction of any oil or gas well within the Town. See id. at 432. Supreme Court struck down the law, specifically noting that the 1981 amendment to ECL Article 23 made it clear that the supersession provision “pre-empts not only inconsistent local legislation, but also

any municipal law which purports to regulate gas and oil well drilling operations, unless the law relates to local roads or real property taxes which are specifically excluded by the amendment.” *Id.* at 434 (emphasis added). Clearly, the Court recognized that the Town’s zoning ordinance was not a generally applicable land use restriction, but instead impermissibly interfered with the operations — the details and procedure — of the oil and gas industry and, thus, contravened the intent of ECL 23-0303(2). *See id.* (“The Town of Kiantone, however, singled out oil and gas drillers for special treatment. The \$2,500 compliance bond and \$25 permit fee are requirements unique to oil and gas well drilling operations and do not apply to any other business or land use. This is precisely what the State amendment to ECL article 23 was designed to prevent.”).

Unlike Kiantone’s zoning ordinance in *Envirogas*, Dryden’s zoning ordinance does not regulate the operations of the oil, gas, and solution mining industries. It does not impose duplicative fees, area and bulk restrictions, or other conditions applicable only to Petitioner and other members of the oil, gas, and solution mining industry. Instead, the challenged ordinance, adopted under Dryden’s municipal home rule authority, is a generally applicable zoning regulation merely defining the land uses that are permissible and prohibited in the Town. As such, the Court’s holding in *Envirogas* is plainly inapposite and, contrary to Petitioner’s contention, does not control the disposition of this matter.

Nor does the legislative history underlying ECL 23-0303(2) provide a clear indication of the scope of preemption intended by the Legislature. Indeed, other than a passing reference to the supersession language in a memorandum from the Division of Budget, the bill jacket is silent on the preemption issue. *See* Bill Jacket, L 1981, ch 846 (“The existing and amended oil and gas law would supersede all local laws or ordinances regulating the oil, gas, and solution mining industries. Local property tax laws, however, would remain unaffected.”).

Petitioner's submission of the affidavit of Gregory H. Sovas, a former executive branch employee who claims to have been the "primary author of the Amendments to the . . . Oil, Gas and Solution Mining Law in 1981," to establish the Legislature's intent in enacting ECL 23-0303(2) is wholly inappropriate and should be rejected. Sovas Affid., ¶ 7. Notably, Mr. Sovas was not a member of the Legislature at the time the 1981 amendment was enacted and is not qualified to give his opinion on the interpretation of ECL 23-0303(2), which is a pure question of law for this Court. Moreover, Mr. Sovas bases his interpretation of the supersession provision on his recollection of a conversation that he allegedly had with a now-deceased Senator at least 30 years ago, during which "Senator [Jess Present] unequivocally agreed that the law was intended to and did preempt local zoning." Sovas Affid., ¶ 18. New York courts have repeatedly rejected submissions attempting to express the legislative intent behind an enactment, such as Mr. Sovas's affidavit, because they are not part of the recognized legislative history and this Court should do so as well. See e.g. Matter of Lorie C., 49 NY2d 161, 169 (1980) (holding that "a letter, written more than a year after passage of the 1972 amendment and constituting, therefore, no part of the legislative process, is not entitled to consideration as legislative history"); Matter of Morabito v Hagerman Fire Dist., 128 Misc 2d 340, 341 (Sup Ct, Suffolk County 1985) (rejecting an affidavit from "the former Chief Counsel to the Committee on Local Government of the New York State Assembly . . . for the purpose of expressing the intent of the statute's draftsmen since such an affidavit, dated after the effective date of the statute, is not entitled to consideration as legislative history"); Meredith v Monahan, 60 Misc 2d 1081, 1082 (Sup Ct, Rensselaer County 1969) (rejecting submission of an affidavit from "one of the members of the Common Council, . . . which allege[d] certain facts pertaining to the Council's legislative enactments and some surrounding circumstances" on the ground that "the question before the

court is one of law and not of fact and the court cannot question the intent or wisdom of the legislative procedure”).

Additionally, the Department of Environmental Conservation’s (“DEC”) past interpretation of ECL 23-0303(2) has no relevance to this matter whatsoever. See Sovas Affid., ¶¶ 27-29. Because the interpretation of the supersession provision does not require reliance upon DEC’s “knowledge and understanding of underlying operational practices or . . . an evaluation of factual data and inferences to be drawn therefrom,” but instead is a question of “pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent,” DEC’s interpretation of section 23-0303(2) is not entitled to deference. Kurcsics v Merchants Mut. Ins. Co., 49 NY2d 451, 459 (1980); see also Matter of Madison-Oneida Bd. of Coop. Educ. Servs. v Mills, 4 NY3d 51, 59 (2004) (“this Court is faced with the interpretation of statutes and pure questions of law and no deference is accorded the agency’s determination”). Thus, regardless of DEC’s interpretation of the supersession provision, this Court is tasked with determining, as a matter of law, whether the Legislature, by its chosen language, clearly expressed an intent to preempt a local government’s municipal home rule authority to enact generally applicable land use restrictions.

Most importantly, when the Legislature has intended to supersede the local zoning authority, it has done so expressly. For example, in ECL 27-1107, the Legislature expressly declared that local municipalities were prohibited from requiring “any approval, consent, permit, certificate or other condition *including conformity with local zoning or land use laws and ordinances*, regarding the operation of a [hazardous waste treatment, storage, and disposal] facility.” Id. (emphasis added). The Legislature has also expressly preempted local zoning regulation in the context of the siting of major electric generating facilities. See Public Service

Law § 172(1) (“no state agency, municipality or any agency thereof may . . . require any approval, consent, permit, certificate or other condition for the construction or operation of a major electric generating facility”). Clearly, had the Legislature intended to wholly preempt local regulation of permissible land uses under ECL 23-0303(2), it could have easily done so. See e.g. Rhodes, 84 AD3d at 14; Terjesen, 197 AD2d at 165. Its failure to expressly preempt local zoning regulation here requires the conclusion that the Legislature did not intend ECL 23-0303(2) to preempt generally applicable zoning ordinances determining which types of land uses are permitted and prohibited within a municipality.

2. New York Courts’ Interpretation of the Analogous Supersession Clause of the Mined Land Reclamation Law Establishes that the Legislature Did Not Intend to Preempt Generally Applicable Zoning Ordinances.

Although the interpretation of ECL 23-0303(2) required herein is unquestionably a matter of first impression, the phrase “relating to the regulation” has been repeatedly construed by New York courts in the context of the supersession provision in the Mined Land Reclamation Law (“MLRL”). See ECL 23-2703(2). In the Court of Appeals’s landmark decision in Matter of Frew Run Gravel Prods. v Town of Carroll (71 NY2d 126 [1987]), the Court was asked to consider whether the MLRL supersession provision — ECL 23-2703(2) — was “intended to preempt the provisions of a town zoning law establishing a zoning district where a sand and gravel operation is not a permitted use.” Id. at 129. At that time, the MLRL supersession provision provided:

For the purposes stated herein, this title shall supersede all other state and local laws *relating to the extractive mining industry*; provided, however, that nothing in this title shall be construed to prevent any local government from enacting local zoning ordinances or other local laws which impose stricter mined land reclamation standards or requirements than those found herein.

ECL 23-2703(2) (as added by L 1974, c 1043, § 1) (emphasis added). Notably, this language is nearly identical to that contained in ECL 23-0303(2).

Construing this express supersession clause according to the plain meaning of the phrase “relating to the extractive mining industry,” the Court of Appeals concluded that the Town of Carroll Zoning Ordinance — a law of general applicability — was not expressly preempted because the “zoning ordinance relate[d] not to the extractive mining industry but to an entirely different subject matter and purpose: i.e., regulating the location, construction and use of buildings, structures, and the use of land in the Town.” Frew Run Gravel Prods., 71 NY2d at 131 (internal quotation marks omitted). The Court held,

The purpose of a municipal zoning ordinance in dividing a governmental area into districts and establishing uses to be permitted within the districts is to regulate land use generally. In this general regulation of land use, the zoning ordinance inevitably exerts an incidental control over any of the particular uses or businesses which, like sand and gravel operations, may be allowed in some districts but not in others. But, this incidental control resulting from the municipality’s exercise of its right to regulate land use through zoning is not the type of regulatory enactment relating to the ‘extractive mining industry’ which the Legislature could have envisioned as being within the prohibition of the statute ECL 23-2703(2).

Id. at 131-132. Thus, the Court concluded that, in limiting the MLRL supersession to those local laws “relating to the extractive mining industry,” the Legislature intended to preempt only “[l]ocal regulations dealing with the *actual operation and process of mining.*” Id. at 133 (emphasis added).

By interpreting the scope of ECL 23-2703(2) preemption to include only local laws that regulate the actual operation and process of mining, the Court avoided the concomitant impairment of local authority over land use matters that would have inevitably resulted had it accepted the petitioner’s argument that section 23-2703(2) was intended to “preempt a town zoning ordinance prohibiting a mining operation in a given zone.” Id. Indeed, the Court noted,

to read into ECL 23-2703(2) an intent to preempt a town zoning ordinance prohibiting a mining operation in a given zone, as petitioner would have us, would drastically curtail the town's power to adopt zoning regulations granted in subdivision (6) of section 10 of the Statute of Local Governments and in Town Law § 261. Such an interpretation would preclude the town board from deciding whether a mining operation — like other uses covered by a zoning ordinance — should be permitted or prohibited in a particular zoning district. In the absence of any indication that the statute had such purpose, a construction of ECL 23-2703(2) which would give it that effect should be avoided.

Id. at 133-134.

Following the Court of Appeals's decision in Frew Run Gravel Prods., the Legislature amended ECL 23-2703(2) to expressly codify the Court's holding. See L 1991, ch 166, § 228.

As amended, the MLRL supersession provision now reads, in pertinent part:

For the purposes stated herein, this title shall supersede all other state and local laws relating to the extractive mining industry; provided, however, that nothing in this title shall be construed to prevent any local government from:

- a. enacting or enforcing local laws or ordinances of general applicability, except that such local laws or ordinances shall not regulate mining and/or reclamation activities regulated by state statute, regulation, or permit; or
- b. enacting or enforcing local zoning ordinances or laws which determine permissible uses in zoning districts.

ECL 23-2703(2). Had the Legislature disagreed with the Court's interpretation of the phrase "relating to the extractive mining industry" in Frew Run Gravel Prods., this amendment gave it ample opportunity to so state and add a provision expressly preempting all generally applicable local zoning ordinances. That the Legislature declined to do so is significant. See e.g. Falk v Inzinna, 299 AD2d 120, 122-125 (2d Dept 2002) (noting that "if the Legislature intended to limit or qualify disclosure under CPLR 3101[i], as did the Court of Appeals in DiMichel [v South Buffalo Ry. Co. (80 NY2d 184 [1992])], it would have added language to that effect").

In light of the amendment to section 23-2703(2), the Town of Sardinia, a rural community located in western New York, amended its zoning ordinance to eliminate mining as a

permitted use within all zoning districts in the Town. See Matter of Gernatt Asphalt Prods. v Town of Sardinia, 87 NY2d 668, 674-676 (1996). Petitioner, the owner and operator of three mines within the Town, challenged the amendments on various grounds, including that the Town's authority to eliminate mining as a permitted use in *all* zoning districts was superseded by ECL 23-2703(2). Specifically, the petitioner argued that the Court of Appeals's holding in Frew Run Gravel Prods. only left "municipalities with the limited authority to determine in *which* zoning districts mining may be conducted but not the authority to prohibit mining in *all* zoning districts." Id. at 681.

The Court, however, rejected the petitioner's attempt to so limit the municipality's home rule authority. See id. Instead, the Court reaffirmed its holding in Frew Run Gravel Prods. that the MLRL supersession clause was intended to preempt only those local laws that regulated the operations of mining. See id. at 682. Indeed, the Court noted,

In Frew Run, we distinguished between zoning ordinances and local ordinances that directly regulate mining activities. Zoning ordinances, we noted, have the purpose of regulating land use generally. Notwithstanding the incidental effect of local land use laws upon the extractive mining industry, zoning ordinances are not the *type* of regulatory provision the Legislature foresaw as preempted by Mined Land Reclamation Law; the distinction is between ordinances that regulate property uses and ordinances that regulate mining activities.

Id. at 681-682. Recognizing the primacy of local control over local land use matters, the Court further noted that "[a] municipality is not obliged to permit the exploitation of any and all natural resources within the town as a permitted use if limiting that use is a reasonable exercise of its police powers to prevent damage to the rights of others and to promote the interests of the community as a whole." Id. at 684. Thus, the Court concluded, because the amendment to the MLRL supersession clause only "withdr[ew] from municipalities the authority to enact local laws imposing land reclamation standards that were stricter than the State-wide standards," and

went no further, it could not be inferred that “the Legislature intended the MLRL to . . . limit municipalities’ broad authority to govern land use.” Id. at 682; see also Preble Aggregate v Town of Preble, 263 AD2d 849, 850 (3d Dept 1999) (“A municipality retains general authority to regulate land use and to regulate or prohibit the use of land within its boundaries for mining operations, although it may not directly regulate the specifics of the mining activities or reclamation process. Control over permissible uses in a particular zoning area is merely incidental to a municipality’s right to regulate land use within its boundaries.”), ly denied 94 NY2d 760 (2000).

Relying on these holdings, New York courts have repeatedly upheld municipalities’ authority to enact generally applicable zoning ordinances that incidentally affect the extractive mining industry, but do not regulate the operations thereof. See e.g. Village of Savona v Knight Settlement Sand & Gravel, 88 NY2d 897, 899 (1996) (“the Mined Land Reclamation Law does not preempt a municipality’s authority, by means of its zoning powers, to regulate or prohibit the use of land within its municipal boundaries for mining operations”); Patterson Materials Corp. v Town of Pawling, 264 AD2d 510, 512 (2d Dept 1999) (holding that “local laws of general applicability that, at best, would have an incidental burden upon mining” were not preempted); Preble Aggregate, 263 AD2d at 850 (upholding a local law that “prohibited mining below the watertable but otherwise permitted it upon issuance of a special use permit” against a preemption challenge); O’Brien v Town of Fenton, 236 AD2d 693, 695 (3d Dept 1997) (holding that a local law that prohibited mining outside of a designated mining district and revoked the mining classification for abandoned mines was not preempted under ECL 23-2703[2]), ly denied 90 NY2d 807 (1997); Seaboard Contr. & Material v Town of Smithtown, 147 AD2d 4, 7 (2d Dept 1989) (holding that, because the challenged zoning ordinance dealt with the permissible location

of mines and not their operations, it was not preempted by ECL 23-2703[2]), appeal dismissed 74 NY2d 892 (1989), lv denied 75 NY2d 707 (1990).

The Court of Appeals’s reasoning in Few Run Gravel Prods. and Gernatt Asphalt Prods. has also been applied in the context of preemption under the Alcoholic Beverage Control (“ABC”) Law, leading to the same result. For example, in DJL Rest. Corp. v City of New York (96 NY2d 91 [2001]), New York City amended its zoning resolution to regulate the location of “adult establishments,” which included many establishments that were licensed to dispense alcoholic beverages. See id. at 93. Although noting that “the State’s ABC Law impliedly preempts its field . . . by comprehensively regulating virtually all aspects of the sale and distribution of liquor” (id. at 95-96), the Court nonetheless concluded that the City’s amendment was not preempted because it “applie[d] not to the regulation of alcohol, but to the *locales* of adult establishments irrespective of whether they dispense alcoholic beverages.” Id. at 97. This type of incidental effect on the preempted field, the Court noted, was not the kind of regulation prohibited by the ABC Law. See id. (“To be sure, by regulating land use a zoning ordinance ‘*inevitably exerts an incidental control* over any of the particular uses or businesses which . . . may be allowed in some districts but not in others.’ Nevertheless, as we have observed, separate levels of regulatory oversight can coexist. State statutes do not necessarily preempt local laws having only ‘tangential’ impact on the State’s interests. Local laws of general application — which are aimed at legitimate concerns of a local government — will not be preempted if their enforcement only incidentally infringes on a preempted field.” [some internal quotation marks omitted] [quoting Few Run Gravel Prods., 71 NY2d at 131]).

The principles articulated in Few Run Gravel Prods. were similarly extended to the preemption analysis undertaken with respect to article 19 of the Mental Hygiene Law in

Incorporated Vil. of Nyack v Daytop Vil. (78 NY2d 500 [1991]). Specifically, in article 19 of the Mental Hygiene Law, the Legislature adopted sweeping regulations designed to “address the myriad problems that have flowed from the scourge of substance abuse in this State.” Id. at 506. Although acknowledging that the Legislature adopted a comprehensive regulation scheme addressing substance abuse issues, the Court of Appeals, in Daytop Vil., was unconvinced that “the State’s commitment to fighting substance abuse preempts all local laws that may have an impact, however tangential, upon the siting of substance abuse facilities.” Id. Instead, the Court concluded, in light of the Village’s “legitimate, legally grounded interest in regulating development within its borders,” the generally applicable zoning ordinance requiring the owner of a substance abuse facility to apply for a variance and certificate of occupancy was “not preempted by State regulation of the licensing of substance abuse facilities.” Id. at 508.

Indisputably, the principles of preemption stated in Few Run Gravel Prods. and Gernatt Asphalt Prods. have continuing vitality today and are applicable in this matter. As the Court of Appeals expressly held, the phrase “relating to” as used in the MLRL supersession clause, and the nearly identical language employed in ECL 23-0303(2), means only that local governments are preempted from regulating the actual operations, processes, and details of the mineral mining and oil, gas, and solution mining industries, not from adopting generally applicable zoning ordinances that determine what land uses shall be permissible within the municipality. This Court should similarly construe the phrase “relating to regulation” in ECL 23-0303(2) as the Court of Appeals has the Mined Land Reclamation Law supersession clause in Few Run Gravel Prods. and Gernatt Asphalt Prods.

- 3. The Supersession Clause Contained in Pennsylvania’s Oil and Gas Act Has Been Similarly Construed Not to Preempt Generally Applicable Zoning Ordinances.**

In construing ECL 23-0303(2), this Court should also consider the interpretation of Pennsylvania's Oil and Gas Act, which contains a similar supersession provision. Specifically, section 602 of the Pennsylvania Oil and Gas Act expressly supersedes "all local ordinances and enactments *purporting to regulate oil and gas well operations* regulated by this act," with the exception of ordinances adopted pursuant to two Pennsylvania state statutes, neither of which concerns a local municipality's zoning authority. PA Stat Ann, tit 58, § 601.602 (emphasis added).² Plainly, this language is similar to that adopted by the New York Legislature. Pennsylvania's interpretation of section 602, also dealing with the oil and gas industry, is particularly instructive here.

As the Court of Appeals did with respect to the issue of preemption under the MLRL supersession clause, the Pennsylvania Supreme Court has, in two decisions issued in conjunction, addressed the scope of preemption under section 602. First, in Huntley & Huntley, Inc. v Borough Council of Borough of Oakmont (600 Pa 207, 964 A2d 855 [2009]), the plaintiff challenged the denial of a conditional use permit to drill and operate a natural gas well within the Town on the grounds, among others, that the Borough's zoning ordinance restricting the location of natural gas wells was preempted by section 602. See id. at 212, 964 A2d at 858. Although noting that "[s]ection 602 of the Oil and Gas Act contain[ed] express preemption language . . . [t]hat . . . totally preempts local regulation of oil and gas development," with certain non-relevant

² Section 602 provides, in full:

Except with respect to ordinances adopted pursuant to the act of July 31, 1968, known as the Pennsylvania Municipalities Planning Code, and the act of October 4, 1978, known as the Flood Plain Management Act, all local ordinances and enactments purporting to regulate oil and gas well operations regulated by this act are hereby superseded. No ordinances or enactments adopted pursuant to the aforementioned acts shall contain provisions which impose conditions, requirements or limitations on the same features of oil and gas well operations regulated by this act or that accomplish the same purposes as set forth in this act. The Commonwealth, by this enactment, hereby preempts and supersedes the regulation of oil and gas wells as herein defined.

PA Stat Ann, tit 58, § 601.602 (footnotes and citations omitted).

exceptions, the Supreme Court concluded that “the express preemption command [was] not absolute.” Id. at 221, 964 A2d at 863. Instead, the Court held, the scope of section 602’s preemption extended only to regulation of the “technical aspects of well functioning and matters ancillary thereto (such as registration, bonding, and well site restoration), [but not] the well’s location.” Id. at 223, 964 A2d at 864. Indeed, the Court noted, “[a]lthough one could reasonably argue that a well’s placement at a certain location is one of its features in a general sense, it is not a feature of the well’s operation because it is not a characteristic of the manner or process by which the well is created, functions, is maintained, ceases to function, or is ultimately destroyed or capped.” Id. at 222-223, 964 A2d at 864.

The Court further drew a salient distinction between the purposes served by the Oil and Gas Act and those served by local zoning ordinances:

By way of comparison, the purposes of zoning controls are both broader and narrower in scope. They are narrower because they ordinarily do not relate to matters of statewide concern, but pertain only to the specific attributes and developmental objectives of the locality in question. However, they are broader in terms of subject matter, as they deal with all potential land uses and generally incorporate an overall statement of community development objectives that is not limited solely to energy development.

Id. at 224, 964 A2d at 865. Emphasizing these disparate purposes, the Court ultimately concluded that the Borough’s generally applicable zoning ordinance determining the permissible location of natural gas wells within the municipality was not preempted by section 602. See id. at 225-226, 964 A2d at 866 (“[A]bsent further legislative guidance, we conclude that the Ordinance serves different purposes from those enumerated in the Oil and Gas Act, and hence, that its overall restriction on oil and gas wells in R-1 districts is not preempted by that enactment.”).

In contrast, in Range Resources-Appalachia, LLC v Salem Township (600 Pa 231, 964 A2d 869 [2009]), the Court was asked to determine whether a Salem Township zoning ordinance “directed at regulating surface and land development associated with oil and gas drilling operations” was preempted under section 602. Id. at 232, 964 A2d at 870. Specifically, the challenged ordinance required oil and gas drillers to obtain a municipal permit for all drilling-related activities; regulated the location, design, and construction of access roads, gas transmission lines, water treatment facilities, and well head; established a procedure for residents to file complaints regarding surface and ground water contamination allowed the Township to declare drilling a public nuisance and to revoke or suspend a permit; and established requirements for site access and restoration. See id. at 234, 964 A2d at 871. Noting its holding in Huntley that section 602’s preemptive scope did not “prohibit municipalities from enacting traditional zoning regulations that identify which uses are permitted in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones” (id. at 236, 964 A2d at 872), the Court concluded that the Township’s zoning ordinance far exceeded the permissible bounds of zoning regulation by adopting “regulations pertaining to features of well operations that substantively overlap with similar regulations set forth in the Act” and, thus, was preempted under section 602. Id. at 240-244, 964 A2d at 875-877. Clearly, the Salem Township ordinance by regulating the technical aspects of oil and gas drilling and imposing additional restrictions above and beyond those contained in the Pennsylvania Oil and Gas Act went too far.

Both the Pennsylvania and New York courts, when construing nearly identical preemption language, have concluded that the scope of preemption of local laws plainly does not encompass a municipality’s authority to adopt generally applicable zoning ordinances that govern the permissible and prohibited uses of land within its borders. Thus, as the Pennsylvania

Supreme Court held in Huntley, the nearly identical preemption language contained in both section 602 of the Pennsylvania Oil and Gas Act and ECL 23-0303(2) do not prohibit municipalities from enacting generally applicable zoning ordinances that identify which uses are permitted and prohibited in different areas of the locality, even if such regulations preclude oil and gas drilling in certain zones. As such, this Court should conclude that ECL 23-0303(2) does not preempt generally applicable zoning ordinances enacted pursuant to a municipality's home rule powers.

C. The Legislature Has Not Impliedly Preempted Generally Applicable Zoning Ordinances.

Alternatively, Petitioner argues that, even if this Court concludes that the Legislature has not expressly preempted a municipality's home rule authority to adopt generally applicable zoning regulations, "the Legislature has impliedly evidenced its intent to preempt local regulation of the oil and gas industry, including local zoning, in favor of promoting the development of the resource to maximize recovery and protect the correlative rights of the mineral owners across the State." Pet's Mem of Law, at 13. However, because the Legislature expressly stated its intent to preempt only "regulation of the oil, gas and solution mining industries," the doctrine of implied preemption need not be considered. See Matter of People v Applied Card Sys., Inc., 11 NY3d 105, 113 (2008) ("When dealing with an express preemption provision, as we do here, it is unnecessary to consider the applicability of the doctrines of implied or conflict preemption."), cert denied 129 S Ct 999 (2009). In any event, even considering the doctrine of implied preemption, this Court should hold that the Legislature did not intend to preempt local zoning authority in favor of the absence of land use regulation permitting oil and gas derricks to be sited at any location within a municipality without any local input.

Where the Legislature has not expressly stated its intent to preempt local regulation, “that intent may be implied from the nature of the subject matter being regulated as well as the scope and purpose of the state legislative scheme, including the need for statewide uniformity in a particular area. A comprehensive and detailed statutory scheme may be evidence of the Legislature’s intent to preempt.” Matter of Cohen v Board of Appeals of Vil. of Saddle Rock, 100 NY2d 395, 400 (1989). In examining whether the Legislature has impliedly preempted local regulation, the courts must examine whether “the State has acted upon a subject and whether, in taking action, it has demonstrated a desire that its regulations should preempt the possibility of discordant local regulations.” Id.; see also Daytop Vil., 78 NY2d at 508. “A desire to pre-empt may be implied from a declaration of State policy by the Legislature or from the fact that the Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area.” Consolidated Edison Co. of N.Y. v Town of Red Hook, 60 NY2d 99, 105 (1983) (citation omitted); see also People v De Jesus, 54 NY2d 465, 469 (1981) (comprehensive and detailed regulatory scheme imposed under Alcohol Beverage Control Law impliedly evidenced the Legislature’s intent to preempt the entire field); Robin v Incorporated Vil. Of Hempstead, 30 NY2d 347, 350 (1972) (declaration of State policy to preempt “the subject of abortion legislation and occupy the entire field so as to prohibit additional regulation by local authorities in the same area”).

Here, ECL 23-0301 provides the Legislature’s statement of policy underlying the statewide regulation of the oil, gas, and solution mining industries. Specifically, section 23-0301 declares that it is

in the public interest to regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas

may be had, and that the correlative rights of all owners and the rights of all persons including landowners and the general public may be fully protected, and to provide in similar fashion for the underground storage of gas, the solution mining of salt and geothermal, stratigraphic and brine disposal wells.

Contrary to Petitioner's suggestion, however, this policy does not in any way indicate that the Legislature intended solely to promote the viability of oil and gas drilling in New York. To the contrary, the Legislature's declaration of policy specifically recognizes the interplay that must occur between the rights of owners of oil and gas properties, such as Petitioner, and the rights of all landowners and the general public. In order to fully protect the rights of both, as ECL 23-0301 states, the Legislature cannot have intended to wholly supersede the municipal home rule authority of local governments to determine whether and in which districts oil and gas drilling operations will be permitted. To hold otherwise would obviate the clear balancing of rights sought to be protected by the Legislature, and would grant Petitioner, and potentially DEC, total control over uniquely local land use matters.

Moreover, although the Legislature has indeed enacted detailed statutory provisions governing the operations of the oil and gas industries, generally applicable zoning ordinances determining whether, and in which districts, heavy industrial uses such as oil and gas drilling may be permitted, such as the challenged regulation herein, are not inconsistent with the State regulations since they do not impact the day-to-day operations of the industry. See e.g. Jancyn Mfg. Corp., 71 NY2d at 97 (state law regulating use of sewage system additives did not preempt local legislation prohibiting use of any sewage system additives without county health department approval); Matter of JIJ Realty Corp. v Costello, 239 AD2d 580, 582 (2d Dept 1997) (holding that a zoning provision prohibiting the use of a warehouse for storage of lubricating oil and grease was not inconsistent with the purpose underlying the Petroleum Bulk Storage Code and, thus was not impliedly preempted by state law), lv denied 90 NY2d 811 (1997).

Petitioner extensively relies on the ECL provisions regulating delineation of pools and well spacing units, among other things, as evidence that the actual location of oil and natural gas wells is a matter within the exclusive province of the State. Contrary to Petitioner's argument, however, these regulations merely establish a limit on the number of wells that may be constructed statewide and provide minimum area and setback requirements to ensure adequate protection of the State's natural resources, as well as to encourage an efficient yield of resources where it is permitted. See ECL 23-0501, 23-0503; see also DEC Revised SGEIS, at 3-10, 5-22 to 5-23. Notably, the State-imposed limitations on well siting expressly govern the operations of the oil, gas, and solution mining industries, as contemplated by the Legislature in enacting ECL 23-0303(2), but do not contain any provisions that can be read to indicate the Legislature intended to wholly preempt a municipality's exercise of its constitutionally-guaranteed zoning authority. Indeed, as the Third Department recognized, "[a] necessary consequence of limiting the number of wells is that some people will be prevented from drilling to recover the oil or gas beneath their property." Matter of Western Land Servs., Inc. v Department of Env'tl. Conservation of State of N.Y., 26 AD3d 15, 17 (3d Dept 2005), lv denied 6 NY3d 713 (2006). Thus, although a prohibition on heavy industrial uses, such as oil and gas drilling, within a municipality may have an incidental impact on Petitioner's business, the ECL restrictions governing well siting plainly do not evidence any legislative intent to preempt municipal zoning authority in its entirety.

Nor would a local government determination that oil and gas extraction and development is not a permissible use of land within the municipality prevent landowners from realizing the financial gains that may potentially result from recovery of their subsurface minerals, as Petitioner asserts. In order to address the perceived inequity of some landowners being

prohibited from drilling on their properties, New York has “adopted the doctrine of ‘correlative rights,’ whereby each landowner is entitled to be compensated for the production of the oil or gas located in the pool beneath his or her property regardless of the location of the well that effects its removal.” Id. As such, regardless of whether a landowner is prohibited from conducting oil and gas drilling within a specific municipality, the landowner will still be entitled to compensation for his fair share of the oil or gas produced from beneath his property, whether by voluntary agreement, an order of DEC, or otherwise.

In sum, even if this Court were to consider the doctrine of implied preemption, which it should not in light of the express supersession language contained in ECL 23-0303(2), it is clear that the Legislature, in enacting state regulations governing the operations of the oil, gas, and solution mining industries, did not intend to wholly preempt local governments’ municipal home rule authority to adopt generally applicable zoning ordinances determining the permitted and prohibited uses of land within their borders.

POINT III

GENERALLY APPLICABLE MUNICIPAL ZONING ORDINANCES ARE NOT PREEMPTED UNDER ECL 23-0303(2)

If this Court were to accept Petitioner’s contention in this proceeding — that generally applicable municipal zoning ordinances are superseded by the Environmental Conservation Law solely for property within the municipality owned or leased by a corporation in the oil and gas industry, such as Petitioner — municipalities throughout the State, including Ulysses, would be deprived of the express authority that was delegated to them by the Legislature and derived from the New York State Constitution to determine what types of land uses best serve the needs and interests of their residents. New York case law simply does not support Petitioner’s interpretation of ECL 23-0303(2). In any event, significant policy reasons exist why this Court

should conclude that the Legislature did not intend section 23-0303(2) to preempt generally applicable zoning ordinances.

Plainly, New York has a longstanding history promoting local governments' municipal home rule powers. See NY Const, art IX, § 1 ("Effective local self-government and intergovernmental cooperation are purposes of the people of the state."); Lanza v Wagner, 11 NY2d 317, 325 (1962) (noting that the "purpose of [the constitutional municipal home rule] provisions is to preserve the principle of home rule for cities, towns and villages"); Matter of Town of E. Hampton v State of New York, 263 AD2d 94, 96 (3d Dept 1999) ("The unquestioned purpose behind the home rule amendment was to expand and secure the powers enjoyed by local governments." [internal quotation marks omitted]). This history undoubtedly extends to the delegation of planning and zoning responsibilities to local governments because local elected officials are the ones most intimately involved with the land use issues that specifically face each municipality. See e.g. Town Law §§ 261, 272-a; see also General City Law § 20(24), (25); Village Law §§ 7-700, 7-722. The Legislature expressly delegated these powers to local governments precisely because it determined those matters should not be handled on a statewide level. Moreover, municipalities expend significant amounts of time, effort, and resources on developing a comprehensive plan, outlining the zoning and planning goals for the future of their communities, and extensively rely on those plans in determining what land uses should be permitted within their borders. This constitutionally-guaranteed authority simply cannot be undermined solely because a corporation in the oil and gas industry, such as Petitioner, owns or leases property within the municipality.

Taking Petitioner's position to its logical conclusion, if generally applicable local zoning ordinances are held to be preempted by ECL 23-0303(2), a local municipality would be without

any control whatsoever over where an oil or gas derrick could be located. Presumably, Petitioner could acquire the leasehold or other rights to a parcel of property in any part of a city, town, or village and, without any local review, immediately begin to conduct drilling operations in the middle of a residential neighborhood or next to the courthouse, church, or school, so long as it had State approval to do so. Nor would Petitioner be required to comply with any generally applicable local ordinance, such as the Building Code, which is implemented at the local level.

Local land use matters, including whether and where to permit heavy industrial uses, simply are not within the purview of the Department of Environmental Conservation (“DEC”) and should not be determined solely by reference to whether an oil and gas company, such as Petitioner, owns or leases property within the municipality. Simply put, as a matter of sound public policy, local land use matters cannot be taken out of the hands of those who best know the unique issues facing the municipality.

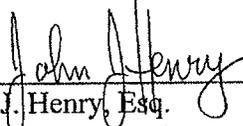
Clearly, significant public policy considerations weigh in favor of interpreting ECL 23-0303(2) according to its plain language, limiting its application to only those local laws that actually regulate the operations of oil, gas, and solution mining, and recognizing the preeminence that municipal home rule powers are afforded in this State. Absent an express legislative direction that ECL 23-0303(2) was intended to preempt generally applicable local zoning regulations, this Court should reject Petitioner’s claims herein.

CONCLUSION

For the foregoing reasons, as well as those stated in the accompanying affidavit of Roxanne Marino, the Supervisor of the Town of Ulysses, and the affirmation of John J. Henry, Esq., the Town of Ulysses respectfully requests that this Court grant it permission to appear as amicus curiae in this proceeding and, on the merits, deny the Petition in its entirety.

Dated: November 1, 2011
Albany, New York

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